IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
October 7, 2008 Session

STATE OF TENNESSEE v. JOSHUA CALEB SIMMONS

Direct Appeal from the Circuit Court for Van Buren County
No. 2054F Larry B. Stanley, Jr., Judge

No. M2008-00107-CCA-R3-CD - Filed August 5, 2009

The Defendant-Appellant, Joshua Caleb Simmons ("Simmons"), pled guilty to promotion of methamphetamine manufacture, a Class D felony. He received two years' probation after the service of ninety days in jail. As part of the plea agreement, Simmons reserved a certified question of law pursuant to Rule 37(b)(2)(i) of the Tennessee Rules of Criminal Procedure. The certified question is "[w]hether the detention of the Defendant exceeded the constitutionally lawful period of detention considering the cite and release statute and the seat belt statute so as to make the subsequent consent, search and seizure of evidence illegal and therefore inadmissible?" Following our review, we reverse the judgment of the trial court and remand for proceedings consistent with this opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed and Vacated

CAMILLE R. MCMULLEN, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and D. KELLY THOMAS, JR, JJ., joined.

J. Al Johnson, Spencer, Tennessee, for the defendant-appellant, Joshua Caleb Simmons.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; Lisa S. Zavogiannis, District Attorney General; and Mark E. Tribble, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS AND PROCEDURAL HISTORY

On March 26, 2007, Simmons and Jerry Wayne Roberts[1] ("Roberts") were indicted together as co-defendants by the Van Buren County Grand Jury and charged with promotion of methamphetamine manufacture and attempt to manufacture methamphetamine as a result of evidence recovered during a traffic stop. Simmons filed a motion to suppress the recovered

[1] Robert's case is not the subject of this appeal.

evidence; however, the trial court denied Simmons' motion. Simmons subsequently pled guilty to the promotion of methamphetamine charge, and the remaining charge was dismissed. As part of the plea agreement, Simmons reserved for appeal a certified question of law challenging the trial court's denial of his motion to suppress.

Suppression Hearing. The following evidence was presented at the suppression hearing: Chris Rice, a deputy sheriff with the Van Buren County Sheriff's Office, testified that on July 30, 2006, at approximately 7:50 p.m., he observed something dragging under a two-door 1990 model Geo vehicle traveling south on Highway 111 in Van Buren County. While stopped at an intersection, Deputy Rice noticed that Simmons, the front-seat passenger, was not wearing a seatbelt. The vehicle turned into a liquor store parking lot and stopped. Deputy Rice then parked behind the vehicle, exited his patrol vehicle, and approached the driver's side door. Deputy Rice asked the driver for proof of registration and insurance. Deputy Rice stated that Manus, another co-defendant, was a passenger in the backseat. Deputy Rice testified that "[e]verybody was nervous. That was an indicator that something was wrong." Deputy Rice could not remember the precise motions made by the occupants that illustrated that they were nervous, but he did remember that the occupants were "squirming."

Deputy Rice was one of the deputies who searched the vehicle and found two boxes of Sudafed cold pills, a stack of matchbooks with strikers missing, and tubing. The above items were located in different parts of the vehicle, some in a backpack, with everything in the backseat. Deputy Rice stated the significance of finding those items together was that "in a normal world, they shouldn't be together. The pills and the matchbooks with the strikers missing and the rubber tubing, that is something that is not normal." Deputy Rice considered all of the above items "raw materials" that were consistent with the manufacture of methamphetamine. Based on Deputy Rice's search, the items that were recovered were "immediately available" to all three individuals in the vehicle. Simmons later admitted to purchasing some of the items recovered from the vehicle. Deputy Rice asked the driver who owned the backpack, but he could not recall the driver's answer. Deputy Rice recalled the driver's response when asked who owned the items he recovered from the vehicle:

> At first [the driver] said he didn't know whose they were. I got a lot of different stories. I couldn't sort them out. I couldn't tell you how many stories I got. I called the District Attorney on the cell phone while they was [sic] there, and that is when I started arresting people. That is when he started talking saying whose it was. [The driver] said, let these other guys take the charge because I am on probation, or something like that.

Deputy Rice stated that he did not find anything on Simmons' person but did find a bottle of cold medicine and one of the boxes of Sudafed pills under the seat where Simmons was sitting. Deputy Rice further stated that Simmons later admitted to purchasing the bottle of cold medicine and a pack of twelve hour Sudafed pills that were recovered from the vehicle.

On cross-examination, Deputy Rice testified that he did not remember activating his blue emergency lights when he parked behind the vehicle because the vehicle had already stopped in the parking lot of the liquor store. He stated that everyone was safely away from the flow of traffic

while in the parking lot. Deputy Rice explained that if a passenger in a vehicle is not wearing a seatbelt, then he issues that passenger a citation. Deputy Rice admitted that he never wrote a citation for the seat-belt violation in this case.

Deputy Rice stated that it normally takes him approximately ten minutes to issue a citation for a seatbelt violation. He obtained Simmons and the other occupants driver's licenses to verify if anyone had any outstanding warrants. He stated that he held their licenses for a minute or two and could not remember when he returned them. Deputy Rice stated that he recognized Roberts because "[Roberts] had had prior involvement in purchasing precursors for methamphetamine." Deputy Rice then called for assistance. Deputy Rice acknowledged that he knew that Deputy Mark Evans and Deputy Chris Russell had a drug dog with them at the time he requested their assistance.

Deputy Rice acknowledged that he does not normally request assistance for a seatbelt violation. He further testified that when he approached the vehicle he did not notice anything that caused him to fear for his safety or anything that suggested criminal activity other than the seatbelt violation and the occupants' nervousness. He did not smell any odor of alcohol or illegal drugs or remember why he asked Simmons and the other occupants to exit the vehicle. He said that he detained the occupants for approximately fifteen minutes before he sought consent to search the vehicle. He could not remember what occurred while he waited for the other officers to arrive. Deputy Rice initially stated that Roberts gave him consent to search the vehicle. However, later in his testimony, Deputy Rice clarified that he did not actually hear Roberts give consent but was aware that Deputy Russell requested and obtained Roberts' consent.

Deputy Rice also acknowledged that, at some point during the stop, "someone [came] up to [them]" and offered Simmons a ride home, but the officers refused to let him go. Deputy Rice estimated they were at the scene of the traffic stop at least thirty (30) minutes but not more than an one (1) hour.

During the above cross-examination, defense counsel asked Deputy Rice if any of the passengers were asked for their consent to search the vehicle. The State objected based on a lack of standing. Defense counsel argued the passengers had standing to challenge a traffic stop based on Brendlin v. California, 551 U.S. 249, 127 S. Ct. 2400, 2408 (2007). The State did not dispute that passengers had standing to challenge the initial stop; however, the State argued passengers did not have standing to challenge a vehicle search. The trial court stated that "people do have interest in the vehicle in which they are riding" and allowed the defense to question the officer regarding the passenger's consent because the court was unsure if passengers could provide consent to search.

Mark Evans, a deputy sheriff with the Van Buren County Sheriff's Office, testified that he assisted in the traffic stop involving Simmons and Roberts on July 30, 2006. He observed Roberts, the driver, sign a consent to search form prior to the search of his vehicle. Both Deputy Evans and Deputy Russell were involved in the conversation regarding Roberts' consent.

On cross-examination, Deputy Evans testified that he arrived at the scene with Deputy Russell within ten minutes of receiving the request for assistance. Deputy Evans stated that a request was also made for Deputy Russell to bring the drug dog to the scene. When they arrived on the

scene, Deputy Evans observed that Deputy Rice's emergency blue lights on his patrol vehicle were activated and the occupants were seated inside Deputy Rice's vehicle. After directing the driver out of the vehicle, Deputy Evans and Deputy Russell spoke with the driver behind their patrol vehicle. Deputy Russell then requested to search the vehicle in "just a matter of a few minutes" after directing the driver out of the vehicle. Deputy Evans later stated that he was "a witness to the conversation between [the driver] and Deputy Russell." Deputy Evans testified that the driver consented to the search of his vehicle on his first request. Deputy Evans stated that neither he nor any other law enforcement officer forced the driver to consent by telling the driver that he needed to consent to the search because he was on parole or probation. Deputy Evans stated that the occupants were not acting suspicious while waiting outside of their vehicle. Deputy Evans said that the driver opened the door to the patrol vehicle, allowed the drug dog to exit, and played with the dog.

In denying Simmons motion to suppress, the trial court stated:

> I don't find this to be particularly confusing or anything. I think he did not stop the vehicle, although it could be described as stopping or seizing, if you will, the driver once the vehicle was stopped. So, I don't find that there was a particular stop. I do find that the driver and the others were not free to go at the time that he approached the vehicle. I think he had probable cause based on the observation of the violation of the seatbelt law. . . .
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> The time frame in this really is not that long. It was probably within thirteen (13) minutes of approaching. That is the way I take it. Somewhere around thirteen (13) minutes . . . of approaching the car, the consent was given. I don't find that to be unreasonable. I don't find at this point that the passengers have to give consent to search the vehicle. I think if there is a violation and the vehicle was stopped without probable cause, I think they would [have] standing to do that. I don't think that someone who has the ability to give the consent to search the vehicle, I don't think they have to go further and get consent from every single person to search a vehicle that does not belong to that particular person, even though they are riding in it. If I am wrong, so be it, but that is the way I understand it. I don't find that the detention was unreasonable. I find that there was probable cause and that consent was given[.]
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> I don't find that anything [Deputy Rice] did was based on nervousness.
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> I find that the officer did not detain the driver or passengers any longer than was reasonable necessary. I think that asking for identification to find out if any of these people had active warrants was not unreasonable in that the detention time itself was not unreasonable, especially based on the fact that this officer had

> knowledge that the persons involved had been engaged in some sort of criminal activity in the past, purchasing ingredients for the manufacture of methamphetamine. . . . I think that he objectively had a reason to inquire regarding the seatbelt. I don't find that the persons involved were arrested. I think they were stopped for that violation, but they were not unreasonably detained. . . .

ANALYSIS

I. Certified Question Presented. Simmons argues that his detention during the traffic stop "exceeded the constitutionally lawful period of detention considering the cite and release statute and the seat belt statute so as to make the subsequent consent, search, and seizure of evidence illegal and therefore inadmissable." The State argues that the trial court correctly concluded that the detention period was reasonable because the officer had knowledge that the occupants of the vehicle "had been involved in buying precursors for manufacturing methamphetamine in the past." We disagree.

Standard of Review. The standard of review applicable to suppression issues involves a mixed question of law and fact. State v. Garcia, 123 S.W.3d 335, 342 (Tenn. 2003). "[A] trial court's finding of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise." State v. Cox, 171 S.W.3d 174, 178 (quoting State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996)). The Tennessee Supreme Court explained this standard in State v. Odom:

> Questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact. The party prevailing in the trial court is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence. So long as the greater weight of the evidence supports the trial court's findings, those findings shall be upheld.

Odom, 928 S.W.2d at 23. The trial court's application of the law to the facts is reviewed de novo. State v. England, 19 S.W.3d 762, 766 (Tenn. 2000).

Extended Detention. The Fourth Amendment to the United States Constitution and article I, section 7 of the Tennessee Constitution protect against unreasonable searches and seizures. A person claiming a Fourth Amendment violation must, as an initial matter, demonstrate a "legitimate expectation of privacy" in the place searched or the thing seized. Rakas v. Illinois, 439 U.S. 128, 143, 99 S.Ct. 421 (1978); State v. Oody, 823 S.W.2d 554, 560 (Tenn. Crim. App.), perm. to appeal denied (Tenn. 1991). Failure to establish an expectation of privacy results in a lack of "standing" to challenge the search. See State v. Patterson, 966 S.W.2d 435, 441 n. 5 (Tenn. Crim. App.1997). The State, on appeal, does not contest that Simmons has standing to challenge the instant search.

"[A] warrantless search or seizure is presumed unreasonable, and evidence discovered as a result thereof is subject to suppression unless the State demonstrates that the search or seizure was conducted pursuant to one of the narrowly defined exceptions to the warrant requirement." State v. Yeargan, 958 S.W.2d 626, 629 (Tenn. 1997). The stop of a vehicle and the detention of its

occupants constitutes a seizure within the meaning of both the Fourth Amendment to the United States and article I, section 7 of the Tennessee Constitution. Whren v. United States, 517 U.S. 806, 809-10, 116 S. Ct. 1769 (1996); State v. Binette, 33 S.W.3d 215, 218 (Tenn. 2000). When the police have probable cause that a traffic violation has occurred, the decision to stop the vehicle is reasonable. State v. Berrios, 235 S.W.3d 99, 105 (Tenn. 2007) (citing Whren, 517 U.S. at 810). In this case, Simmons concedes that the initial stop by Deputy Rice was constitutional. Deputy Rice had probable cause to stop Simmons based on a violation of the misdemeanor seatbelt statute. See T. C. A. § 55-9-603(a)(2) (2006).

In addition to the constitutional aspect of a traffic stop, Tennessee Code Annotated sections 40-7-118 and 55-10-207 provide that when an officer observes certain misdemeanors, such as a passenger not restrained by a safety belt, the officer shall issue a citation for the violation in lieu of arresting the misdemeanant. See T. C. A. §§ 40-7-118(b)(1), 55-10-207(a)(1). "[T]he Tennessee 'cite and release' statute creates a presumptive right to be cited and released for the commission of a misdemeanor." State v. Walker, 12 S.W.3d 460, 464 (Tenn. 2000). Violating the "cite and release" statute infringes upon a person's right against an unreasonable search and seizure. Id. at 467.

After a valid traffic stop has been initiated, a law enforcement officer must not prolong the stop longer than necessary to process the traffic violation without having some reasonable suspicion of other criminal activity sufficient to warrant prolonging the stop. Walker, 12 S.W.3d at 464. Prolonging the stop must be based on reasonable suspicion supported by specific and articulable facts that a crime has been committed or is about to be committed. Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868 (1968); see also England, 19 S.W.3d at 765. This court has previously stated that "no hard-and-fast time limit exists beyond which a [traffic stop] detention is automatically considered too long and, thereby unreasonable." State v. Justin Paul Bruce, No. E2004-02325-CCA-R3-CD, 2005 WL 2007215 at *7 (Tenn. Crim. App., at Knoxville, Aug. 22, 2005). "[T]he proper inquiry is whether during the detention, the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly." State v. Simpson, 968 S.W.2d 776, 783 (Tenn. 1998). A constitutionally reasonable traffic stop may become constitutionally unreasonable "if the time, manner or scope of the investigation exceeds the proper parameters." State v. Troxell, 78 S.W.3d 866, 871 (Tenn. 2002) (quoting United States v. Childs, 256 F.3d 559, 564 (7th Cir. 2001)). Moreover, the officer's actions during the stop must be "reasonably related in scope to the circumstances which justified the interference in the first place." Terry, 392 U.S. at 20.

Here, the record shows Deputy Rice detained Simmons and the other occupants of the vehicle based solely on their "nervous" behavior and past criminal involvement with methamphetamine. We do not consider the occupant's nervousness in this case with any great import. Berrios, 235 S.W.3d at 105. Although we have found no Tennessee authority squarely addressing this issue, various federal circuits have held that an officer's knowledge of a defendant's prior criminal history alone is likewise insufficient to constitute reasonable suspicion. See e.g. Joshua v. Dewitt, 341 F.3d 430, 446 (6th Cir. 2003) (concluding that petitioner's past criminal history, "by itself, does not create a reasonable suspicion that criminal activity is currently afoot." (emphasis in original)); United States v. Lee, 73 F.3d 1034, 1040 (10th Cir. 1996), overruled on other grounds by United States v. Holt, 264 F.3d 1215 (10th Cir. 2001) (concluding that the officer did not have reasonable suspicion to shift

the scope of detention from a traffic stop to a drug investigation based on defendant's past criminal history).

This court has held that an officer's prior knowledge of a defendant's criminal history or reputation, in addition to other factors, would give rise to reasonable suspicion to further detain a defendant. See e.g. State v. Robert Lee Hammonds, No. M2005-01352-CCA-R3CD, 2006 WL 3431923, at *9 (Tenn. Crim. App., at Nashville, Nov. 29, 2006) **(**finding reasonable suspicion where the officer knew defendant's reputation as a drug user in addition to the defendant's nervousness, presence in a high crime area, and lack of candor regarding his criminal history).

In State v. Westbrooks, this court examined the initial stop of a defendant rather than the subsequent detention. 594 S.W.2d 741 (Tenn. Crim. App. 1979). In Westbrooks, during the hearing on the motion to suppress marijuana seized as a result of a traffic stop, the arresting officer testified that his sole purpose for stopping the defendant was to check his driver's license. Id. at 742. The officer also testified that "he had had prior dealings with the defendant concerning drugs," but the officer did not have any "information that the defendant was involved in any drug-related activity that day." Id. This court held that initiating a stop to check the driver's license of a defendant was not sufficient to constitute reasonable suspicion. Id. at 743. In essence, an officer's prior knowledge that the defendant has a history of being involved in drug- related activity does not give rise to reasonable suspicion to initiate a traffic stop. Further, in Westbrooks, we noted that: 1) the officer did not have any information that the defendant's license had been revoked; 2) the defendant was not in a high crime area; 3) the stop occurred in the mid-afternoon; and 4) the defendant was not acting suspicious in operating his automobile. Id.

Guided by the above authority, we conclude that the occupants' nervous behavior and prior criminal involvement were insufficient to expand the scope of the initial traffic stop. See Lee, 73 F.3d at 1040. First, the record in this case preponderates against the trial courts findings of fact. Although the chronology of events is not entirely clear, Deputy Rice candidly admitted that, other than the seat belt violation, he did not observe any other criminal behavior, did not fear for his safety, and could not remember why he ordered the occupants out of the vehicle in the first instance. These facts do not constitute a reasonable suspicion that criminal activity was afoot to justify extending the detention. Additionally, Deputy Rice explained that he ordinarily issues a traffic citation within approximately ten (10) minutes, but he did not begin to write or issue a citation in this case. He also admitted that he did not ask for consent to search the vehicle until fifteen (15) minutes after the initial stop. Apparently, the driver initially refused to allow Deputy Rice to search the vehicle. The record shows the driver provided consent to a different deputy who arrived almost thirteen (13) minutes after Deputy Rice called for assistance. On these facts, we cannot conclude that the stop was properly accommodated within the duration and scope of the legal traffic stop or independently justified by the facts. State v. Triston Lee Harris, No. M2006-01532-CCA-R3-CD, 2008 WL 345872, at *8 (Tenn. Crim. App., at Nashville, February 6, 2008) (internal quotation omitted). Accordingly, we hold that Simmons' detention was excessive in violation of the Fourth Amendment and therefore illegal.

Because the evidence Simmons seeks to suppress in this case was obtained by consent following an illegal detention, we must now review the circumstances of the consent. Our Supreme

Court has stated

> Whether an individual voluntarily consents to a search is a question of fact to be determined from the totality of the circumstances. The consent must be unequivocal, specific, intelligently given, and uncontaminated by duress or coercion. The pertinent question is this: whether the [individual's] act of consenting is the product of an essentially free and unconstrained choice. If the [individual's] will was overborne and his or her capacity for self-determination critically impaired, due process is offended.

Berrios, 235 S.W.3d at 109 (internal citations and quotations omitted).

"'A consent to search that is preceded by an illegal seizure is not "fruit of the poisonous tree" if the consent is both: 1) voluntary, and 2) not an exploitation of the prior illegality.'" Garcia, 123 S.W.3d at 346 (citing Wayne LaFave, 3 Search and Seizure § 8.2(d) at 656 (3d ed.1996)). When determining whether a voluntary consent is sufficiently attenuated from an unlawful seizure, we are guided by the following factors: "1) the temporal proximity of the illegal seizure and consent; 2) the presence of intervening circumstances; and 3) the purpose and flagrancy of the official misconduct." Id. at 346. The Tennessee Supreme Court has also recognized that "'[a] brief time lapse between a Fourth Amendment violation and consent often indicates exploitation [of the prior illegal police action] because the effects of the misconduct have not had time to dissipate.'" Id. (quoting State v. Hansen, 63 P.3d 650, 666 (Utah 2002)). After applying the above factors to the circumstances of this case, we conclude that the consent to search was not sufficiently attenuated from the illegal detention and is therefore presumptively tainted by the illegal detention. Berrios, 235 S.W.3d at 110.

Here, the consent to search the vehicle was given while Simmons was unlawfully detained. As previously stated, we disagree with the trial court's conclusion that the initial stop lasted no more than thirteen (13) minutes after Deputy Rice approached the vehicle. Deputy Rice plainly testified that (1) he was on the scene at least fifteen (15) minutes before requesting consent; and (2) the other deputies responded to his assistance call within ten (10) minutes. Deputy Evans explained that the consent was obtained in "just a matter of a few minutes" after directing the driver out of Deputy Rice's vehicle. Based on these facts, there was no temporal separation between the illegal detention and the consent. We likewise note that there were no intervening circumstances separating the two events. In regard to "the purpose and flagrancy of the official misconduct," Deputy Rice did not articulate any reason, other than the occupants' prior criminal history with drugs and their nervous behavior, for the detention. Accordingly, we believe the purpose of the extended detention was for the detection of illegal drugs rather than the enforcement of the traffic laws. Berrios, 235 S.W. 3d at 110. Based on the above analysis, the consent to search the vehicle was obtained as a direct result of the illegal detention. Therefore, we conclude that any evidence seized as a result should have been suppressed as "fruit of the poisonous tree." Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407(1963).

CONCLUSION

We conclude that Simmons' detention was excessive in violation of the Fourth Amendment

and therefore illegal. Because the consent to search the vehicle was not sufficiently attenuated from the illegal detention we also conclude the evidence seized as a result of the unconstitutional search of the vehicle should be suppressed. Accordingly, the judgment of the trial court is reversed and the case is remanded for proceedings consistent with this opinion.

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CAMILLE R. McMULLEN, JUDGE